"advocate and solicitor" has been so defined in section 3. When the Act has been extended to Sabah and Sarawak, section 152(2) provides that the Advocates Ordinance of the two States shall be repealed and as such any master in the two States must be a person who is either an advocate and solicitor enrolled under the Act or an advocate enrolled under the repealed Advocates Ordinance of Sabah or Sarawak. This must be the meaning of the term "advocate and solicitor" in section 3 intended by the legislature. To attach any other meaning to the definition would, in our view, produce anomalies and absurdities. Mr. Lee Min Choon, counsel for the respondent, in effect argued that so long as the master was enrolled under the Advocates Ordinance of Sarawak prior to the coming into operation of the Legal Profession Act in West Malaysia, it would be sufficient. In short, the Advocates Ordinance of Sarawak should somehow be read into the Legal Profession Act although the Act is only applicable to West Malaysia and has not come into operation in Sarawak. Surely the provisions of section 1(2), section 2 and section 152(2) of the Act do not permit the Advocates Ordinance of Sarawak to come under the definition of "any written law" in section 3 until and unless the Act has been extended to Sarawak with such modifications as may be necessary. Otherwise the whole object of the Act to consolidate the law relating to the legal profession and to establish a unified Bar for the whole of Malaysia would be defeated. If Mr. Lee's interpretation were correct, then we would not be construing the Act purposively as there was no more purpose or urgency in extending the Act to Sarawak since any advocate enrolled under the Advocates Ordinance of Sarawak from June 1, 1977 onwards, should be deemed an advocate and solicitor under the Act. In construing the words "any written law" in section 3, the whole definition must be construed in the light of other provisions in the Act. We did not agree with Mr. Lee's submission that although the Act had not been extended to Sarawak and notwithstanding that the Advocates Ordinance was still in force, the words "any written law" must include the Advocates Ordinance of Sarawak merely because the said Ordinance was a written law prior to the coming into operation of the Act in the States of West Malaysia. In our view the words "any written law prior to the coming into operation of the Act" must mean, having regard to the whole provisions of the statute, any previous written law that was in force prior to the operation of the Act in West Malaysia, Sabah and Sarawak. The words in section 3 must by necessity refer to any written law in Sarawak, Sabah or West Malaysia repealed by section 152 as and when the Act became applicable to the three parts of Malaysia. As stated earlier, the only prior written law that had been repealed was the Advocates and Solicitors Ordinance 1947. Indeed, in the *Samantha Murthi case (ante)* Suffian L.P. held that "as long as he has been 'admitted and enrolled' under the Act or any previous written law, he is an advocate and solicitor within the meaning of the Act."

In the present appeal there could be no dispute that Mr. Peter Chin could not satisfy the first requirement. He had never been enrolled as an advocate and solicitor either under the Legal Profession Act or the repealed Advocates and Solicitors Ordinance. Before us the objection of the Malaysian Bar was supported by Mr. Mahalingam for the Attorney-General, and for reasons already stated the objection should be upheld and the order of the High Court allowing the petition must be set aside.

Order accordingly.

Solicitors: *Lee Min Choon & Co.*

PIE BIN CHIN v. PUBLIC PROSECUTOR

[A. Cr. J. (Wan Yahya J.) January 10, 1983]
[Melaka – Criminal Appeal No. 18 of 1982]

Criminal Law and Procedure – Charge of corruption – Defective charge – Whether defence prejudiced – Evidence of accomplice – Corroboration – Prevention of Corruption Act, 1961, ss. 4(a) & 14 – Criminal Procedure Code (F.M.S. Cap. 6), s. 422.

Bribery and Corruption – Charge of – Evidence – Corroboration – Wife of complainant not ipso facto an accomplice.

The appellant was charged under section 4(a) of the Prevention of Corruption Act. It was alleged that in the capacity of agent of the government of the Federation he accepted various sums as gratification in respect of his principal's affairs. The main evidence against him came from the complainant who was held to be an accomplice. The learned President of the Sessions Court believed the complainant's evidence as a whole and in particular to the sums which were alleged to have been paid to the appellant. He looked for corroboration and found the required corroboration from the evidence of the wife of the complainant as well as another witness. The appellant was

convicted and he appealed. The main grounds of appeal were (1) that the charge was erroneously framed as the appellant being a Penghulu attached to the State Land office and discharging his duty in connection with lands, was in fact a servant or agent of the State rather than the Federal Government; (2) there were variations in the evidence of the complainant and his wife and his evidence should have been rejected; (3) the wife was an accomplice and one accomplice could not corroborate another and (4) the matters on which she was able to testify did not amount to corroboration.

Held: (1) the misdescription of the word "Federation" instead of the word "State" in the charge had not in any way prejudiced the appellant's defence and the mistake was an irregularity which was curable by section 422 of the Criminal Procedure Code;

(2) the learned President in this case had the advantage of having seen and heard the witness and there was no reason to disagree with his findings as to the credibility of the complainant;

(3) the mere fact that a witness happens to be a wife of an accomplice does not *ipso facto* turn her into an accomplice. The learned President was right in this case in holding that the wife of the complainant was not an accomplice;

(4) in this case the learned President after considering the various circumstances under which the payments were demanded and received, came to the correct conclusion that the monies were accepted by the appellant as gratification. Having invoked the presumption under section 14 of the Prevention of Corruption Act, the learned President had applied the correct test and found that the appellant had failed to raise a reasonable doubt on the balance of probabilities. There was no reason therefore to interfere with his findings.

Cases referred to:

(1) *Government of Negri Sembilan* v. *Tambi Pillay* (1900) S.S.L.R. 65, 68.
(2) *Kassim* v. *Public Prosecutor* [1949] M.L.J. 70.
(3) *Public Prosecutor* v. *Yuvaraj* [1969] 2 M.L.J. 89.
(4) *Manmohan Singh* v. *State* A.I.R. 1969 Punjab 225.
(5) *Hariprasad* v. *Nanoo Khan* A.I.R. 1968 Madhya Pradesh 234, 286.
(6) *Spiers* v. *Johiuddin* A.I.R. 1932 Cal. 461, 462.
(7) *Chittaranjan Das* v. *State of West Bengal* A.I.R. 1963 S.C. 1696 @ 1699.
(8) *W. Slaney* v. *State of M.P.* A.I.R. 1956 S.C. 116, 138.
(9) *P.E. Billinghurst* v. *Emperor* A.I.R. 1924 Cal. 18, 41.

CRIMINAL APPEAL.

F.H. D'Cruz (*Rashid Ali* with him) for the appellant.

Abdul Wahab bin Said Ahmad (Deputy Public Prosecutor) for respondent.

Cur. Adv. Vult.

Wan Yahya J.: The Appellant was charged under section 4(a) of the Prevention of Corruption Act. It was alleged that in the capacity of agent of the Government of the Federation he accepted various sums as gratification in respect of his principal's affairs. The main evidence against him came from the complainant whom the learned President unhesitatingly held to be an accomplice. The learned President believed the complainant's evidence as a whole and in particular to the sums which were alleged to have been paid to the Appellant, but wisely looked elsewhere for corroboration before accepting his evidence. He found the required corroboration from the wife (PW 2) whom he held not to be an accomplice, as well as from another witness (PW 6).

In this appeal the learned President's grounds of judgment were severely objected to on four main grounds. First it was contended that the charge was erroneously framed, as the Appellant, being a Penghulu attached to the State Land Office and discharging his duty in connection with lands, is in fact a servant or agent of the State rather than the Federal Government. Secondly it was argued that, as the complainant's evidence varied on some matters with those of his wife, the lower Court should have rejected his evidence. Then it was contended that as a wife she was an accomplice and that one accomplice cannot corroborate another and lastly it was argued that in any event the matters on which she was able to testify did not amount to corroboration.

I shall be dealing with the first point last. As regards the second ground of appeal, my attention had been drawn to various discrepancies between PW 1's evidence itself as well as between him and his wife. This, by itself, according to Counsel for the Appellant, is good enough reason for the learned President to reject the complainant's story. Discrepancies are no doubt present in this case, as they do ostensibly appear in most cases in evidence of witnesses for the prosecution as well as the defence. The transcripts of most evidence, when thoroughly tooth-combed by any able lawyer, never failed to yield some form of inconsistencies, discrepancies or contradictions but these do not necessarily render the witness's entire evidence incredible. It is only when a witness's evidence on material and obvious matters in the case is so irreconcilable, ambivalent or negational that his whole evidence is to be disregarded.

Forgetfulness and failure to recall exactly certain events, which did not seem to be important

to the witness, do not necessarily shake his credibility or render other parts of his story unworthy of belief. Various persons are endowed with varying powers of cognition, attentiveness and perception, so that it is not uncommon for two witnesses to a common event to describe it in slightly differing versions. Thus the slight dissimilarity between the evidence of the complainant and his wife is explicable. It was further contended that the inconsistencies in the evidence of the complainant itself should make his story unreliable. It is true that he gave capricious accounts of certain facts but then those matters relate mostly to subsidiary issues. He was understandably vague on details on sequence of events relating to the payments but of the payments themselves and the amount paid on each occasion the witness's evidence was positive and categorical. I agree with the learned President's findings on this not only because he, having seen and heard the witness is in a better position than I am to evaluate the credibility of the witnesses, but also because I accept that no witness of truth can account for the details of events which had transpired some 17 months previously with precision.

The next point raised was whether the complainant's wife, in her role firstly as a consort and secondly as a participant in the crime, is an accomplice. The mere fact that a witness happens to be the wife of an accomplice, does not *ipso facto* turn her into an accomplice. The party alleging so must satisfactorily show to the Court that not only did one spouse know about the offence committed by the other but that he or she had willingly participated in that offence or had shown interest. The evidence adduced before the learned President shows that the wife (PW 2) was quite disinterested in the case. She had merely heard the Appellant asking for various sums from her husband and on one or two occasions she had handed the money to her husband to be paid to the Appellant. There was nothing on record to indicate that she knew the monies requested for were in excess of the required payments for the transfers. It would appear from her evidence-in-chief that she is a simple kampong housewife – probably illiterate as she attested the documents with her thumb-print rather than signature. She did not at any time say that she was aware of the actual sums required for the transfer and consequently the Appellant's corrupt motive, neither did she say that the amounts demanded and paid out to the Appellant were in excess of the required fees, or that they were in any way illegal. The defence did not take up these points at all during the ensuing cross examination and it is not open to them to challenge her evidence by merely submitting to the learned President that she is so. Even at the defence stage no attempt was made at all to establish through the Appellant's evidence that the wife was aware of any wrongful payments having been made. As it was not shown in evidence at all that she had knowingly participated in the offence, the learned President was right in holding that she is not an accomplice. In the case of the *Government of Negri Sembilan* v. *Thambi Pillay*[1] Kershaw J.C. said:

> "For the Appellant it was contended that she was not an independent witness. It is true that a wife must be always more or less under the influence of her husband, and she would naturally wish to assist him if possible. At the same time there is nothing to show that Yap Siew Kim took part in, or had knowledge of, the plot to appropriate the registered letter bag, and therefore her evidence cannot in my opinion be regarded as that of an accomplice."

The consequential argument that has been subsequently raised is that how could she corroborate her husband's charge when she was unaware of the illegal demand? The answer to that is corroboration need not be given on each and every matter raised by the complainant. It would suffice if he was corroborated on material issues. In *Kassim* v. *Public Prosecutor*[2], it was held that:

> "The corroboration that is required when the evidence is that of an accomplice need not necessarily give independent support to every factor of the case against the accused and it is sufficient if the corroboration corroborates some material part of the accomplice's story which identifies both him and the accused person with the offence charged and goes towards the identity of the accused person."

Assuming that corroboration is insufficient to support the demand, it is clear by comparison of the documentary evidence with the oral evidence of PW 2 that sums in excess of the fees had been received by the Appellant. I am of the view the learned President, after considering the various circumstances under which the various payments were demanded and received, came to the correct conclusion that the monies were accepted by the Appellant as gratification. Having invoked the presumption under section 14, the learned President applied the correct test on the Appellant's defence as laid down in *Public Prosecutor* v. *Yuvaraj*[3] and found that the Apellant had failed to raise a reasonable doubt in his mind on the balance of probabilities. I find no reason to interfere with his findings.

Reverting to the first objection raised by the defence, I will express my agreement with the

matter raised by Mr. D'Cruz. The Appellant was a Penghulu in Mukim of Pernu in Jasin which is a district in the State of Melaka. He was employed as a Penghulu in the State Land Office and even if the prosecution's improperly admitted record of service is to be accepted, the record therein does not conclusively indicate that the holder must be a servant of the Federal Government. On the contrary the instructions printed at the back of the front cover of the record, in particular para. 7 of which *inter alia* reads:

"Particulars of change or other matters affecting the office is intended to show which *Government, District* and *Department the officer has been posted* or transferred."

and para. 10 as follows:

"The conduct sheet is not to be used as a confidential report and commendations may only be entered in it when such are authorised by the Chief Secretary in the case of *Federal Officers* or State/Settlement Secretaries in the case of *State/Settlement* Officers..."

(My emphasis for clarification)

The Record of Service (Exhibit P 8) is obviously not only the record of service used exclusively by the Federation Government but it is also commonly used to record the particulars of service of State Officers.

Even if this is not the case the duties performed by the Appellant in the course of the alleged offence relate to the transaction of land which, according to the Schedule of the Constitution, is a State matter. Even if the Appellant is to be recognised as a Federal officer, there is no doubt that he was acting in the capacity of an agent for the State and the transaction in land he was dealing with when the offence was committed, was in relation to the State and not the Federal affairs.

Having accepted the contention that the Appellant was acting as an agent for the State Government, my immediate concern is whether this mistake in describing him as a Federal Government agent in the charge will invalidate the proceedings against him. For this purpose I shall refer to section 422 of the Criminal Procedure Code which reads:

"Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account –

of any error, omission or irregularity in the complaint, summons, warrant, charge, judgement or other proceedings before or during trial, or in any inquiry or other proceeding under this Code; or

of the want of any sanction required by Section 129; or

of the omission to settle or revise any list of jurors or assessors; or

of the want of qualification of any juror or assessor; or

of the improper admission or rejection of any evidence; or

of any misdirection in any charge to jurors or asessors;

unless such error, omission, improper admission or rejection of evidence, irregularity want or misdirection has occasioned a failure of justice".

The application of this section, however, is subjected to two conditions. First, the error must have been committed by a Court of competent jurisdiction and secondly, the mistake has not resulted in a failure of justice. In our present appeal there is nothing to suggest that the trial Court was of incompetent jurisdiction and insofar as the failure of justice is concerned, I cannot visualise its presence.

As a rule of the thumb prejudice is an essential ingredient to the failure of justice. The question to be considered here is whether the Appellant has been in any way prejudiced in his defence by this error. If he is not, then no failure of justice has been occasioned. The prosecution in our current case has mistakenly described the word 'State' as 'Federal' in the charges. But for this small error the nature and substance of the offence with which the Appellant was charged remained the same, *i.e.*, he, as an agent, corruptly accepted gratification for doing an Act in respect of his principal's affairs. Such an error, to my mind, is one of form rather than substance.

In the case of *Manmohan Singh* v. *State*[4] the accused was charged with conspiracy of forging a passport. He was acquitted of that charge but convicted for forging some other related document in respect of which no mention was made in the charge. The Punjab High Court held that the conviction was not illegal as the accused was not aware of that offence and he was not prejudiced by it and that such an error was curable under section 535 (now, section 464 of the Indian Code of Criminal Procedure, 1973 which is similar to provision of section 422 of our Criminal Procedure Code.) At p. 242 of the judgment Sakaria J. said:

"I would therefore, hold even at the cost of repetition, that the omission to frame a distinct charge under Section 466, Indian Penal Code, with regard to the forging of the entries in Visa Applications, International Vaccination Certificates, Baggage Declaration Forms, and Embarkation Forms, which were only auxiliaries to the passports, was a mere

irregularity, cured by Sections 535 and 537, if not covered by Section 237 of the Code of Criminal Procedure, particularly when no prejudice is shown to have been caused to the accused, who clearly understood the nature of the offence for which he was being tried and was afforded a full and fair opportunity of defending himself. The contention thus, stands overruled."

Similarly in *Hariprasad* v. *Nanoo Khan*[5] the Court held that the error of mentioning a different section in the charge did not vitiate the proceedings. At p. 286 of the judgment Shiv Dayal J. stated:

"But where there is inadvertence to frame a charge and the facts proved by the prosecution constitute a separate and distinct offence but closely relevant to and springing out of the same set of facts connected with the one charged, Section 535 comes into play (See observations of Chandrashakhara Aiyar and Jagannadhadas, JJ. in *W. Slaney's case,* AIR 1956 SC 116 *(supra).* In that ruling, Das, Acting C.J. and Bose, J. went a step further when their Lordships observed that sections 225, 232, 235 and 537 between them cover every conceivable type of error and irregularity referable to a charge that can possibly arise, ranging from cases in which there is a charge but with errors, irregularities and omissions in it. The Code is emphatic that whatever the irregularity, it is not to be regarded as fatal unless there is prejudice."

Yet another judgment on similar irregularity is to be found in the case of *Spiers* v. *Johiuddin*[6]. At p. 462 of the judgment it was mentioned *inter alia:*

"The accused therefore knew full well what the charge he would have to meet was and that being so if there was any mistake in the number of sections of the Act the accused cannot be said to have in any way been prejudiced thereby. Ground 1 must therefore, in my opinion, fail for the reason that it is too technical."

In *Chittaranjan Das* v. *State of West Bengal*[7] the Supreme Court of India made the following observation generally on error in procedure:

"In this connection, it may be relevant to bear in mind that the requirements of procedure are generally intended to subserve the ends of justice, and so, undue emphasis on mere technicalities in respect of matters which are not of vital or important significance in a criminal trial, may sometimes frustrate the ends of justice. Where the provisions prescribed by the law of procedure are intended to be mandatory, the Legislature indicates its intention in that behalf clearly and contravention of such mandatory provisions may introduce a serious infirmity in the proceedings themselves; but where the provisions made by the law of procedure are not of vital importance, but are, nevertheless, intended to be observed, their breach may not necessarily vitiate the trial unless it is shown that the contravention in question has caused prejudice to the accused. This position is made clear by sections 535 and 537 Cr. P.C."

Another Indian Supreme Court Judgment on this matter is to be found in *W. Slaney* v. *State of M.P.*[8] where it was stated:

"In the main, the provisions of section 535 would apply to cases of inadvertence to frame a charge induced by the belief that the matter on record is sufficient to warrant the conviction for a particular offence without express specification, and where the facts proved by the prosecution constitute a separate and distinct offence but closely relevant to and springing out of the same set of facts connected with the one charged."

In *P.E. Billinghurst* v. *Emperor*[9] where the charge under section 420 of the Penal Code made no mention of the person cheated, the Court held that such failure was not fatal to the case as the accused was not misled by the error. At p. 41 the Court expressed the following opinion:

"We are of opinion, however, that the omission should not be regarded as a fatal defect in the charge, inasmuch as the accused were not misled and there was no failure of justice by reason of the omission of the above-named particulars from the charge."

If the Appellant, in this Appeal before us, had in the first instance been charged as an agent of the State Government, the evidence of the prosecution, but for that relating to the mistake, would have been similar. The Appellant's defence would have taken the same course whether he had been charged as a State or Federal agent. The fact is he was an agent of either one and in that capacity he had accepted gratification as an inducement for doing an act in relation to the affairs of his principal – which could be either.

In my opinion the misdescription of the word Federation instead of the word State in the charge had not in any way prejudiced the Appellant's defence and that the mistake in the charges were irregularities which are curable by section 422.

I do not consider it justifiable to interfere with the findings of the learned President.

The appeal is dismissed.

Appeal dismissed.

Solicitors: *Vohrah & Tan Chee Lan.*